

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

---

**STB EX PARTE NO. 714**

---

233541  
ENTERED  
Office of Proceedings  
December 18, 2012  
Part of  
Public Record

**INFORMATION REQUIRED IN NOTICES AND PETITIONS CONTAINING  
INTERCHANGE COMMITMENTS**

---

**OPENING COMMENTS OF  
UNION ELECTRIC COMPANY D/B/A AMEREN MISSOURI**

---

Sandra L. Brown  
David E. Benz  
Thompson Hine LLP  
Suite 700  
1919 M Street N.W.  
Washington, D.C. 20036  
Phone: (202) 331-8800  
Fax: (202) 331-8330

*Attorneys for Union Electric Company  
d/b/a Ameren Missouri*

December 18, 2012

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

---

**STB FINANCE DOCKET NO. 35654**

---

**INFORMATION REQUIRED IN NOTICES AND PETITIONS CONTAINING  
INTERCHANGE COMMITMENTS**

---

**OPENING COMMENTS OF  
UNION ELECTRIC COMPANY D/B/A AMEREN MISSOURI**

---

Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri”) hereby provides these Opening Comments in the above-captioned proceeding pursuant to the Notice of Proposed Rulemaking (“NPRM”) issued by the Surface Transportation Board (“Board” or “STB”) on November 1, 2012.<sup>1</sup> In the NPRM, the Board proposed to expand disclosure requirements related to rail line leases or sales that would create new paper barriers. As described herein, Ameren Missouri is generally in agreement with the purpose and goals of the rule changes proposed in the NPRM, but Ameren Missouri has concerns about the application of the proposed rules and the limited avenue to address existing harm. Ameren Missouri believes the Board can and should take further action to address the anti-competitive impact of paper barriers.

**I. Identity and interest of Ameren Missouri.**

Ameren Missouri is Missouri’s largest utility, providing electricity to approximately 1.2 million customers in central and eastern Missouri. Ameren Missouri owns and operates several rail-served, coal-fired electric generating stations in Missouri, including the Labadie generating station in Franklin County, Missouri. A paper barrier affects rail service at Labadie, and Ameren

---

<sup>1</sup> The Board modified the procedural schedule in a decision issued on November 15, 2012.

Missouri has challenged that paper barrier in a pending proceeding at the Board. See Union Electric Company d/b/a Ameren Missouri and Missouri Central Railroad Company v. Union Pacific Railroad Company, STB Docket No. NOR 42126; Missouri Central Railroad Company – Acquisition and Operation Exemption – Lines of Union Pacific Railroad Company, STB FD No. 33508; and GRC Holdings Corporation – Acquisition Exemption – Lines of Union Pacific Railroad Company, STB FD No. 33537 (collectively, “Ameren Missouri and MCRR v. UP”). The Ameren complaint was filed over two years ago and the record closed 15 months ago. Therefore, both generally and specifically, Ameren Missouri has a significant interest in the paper barrier issue.<sup>2</sup>

**II. The Board is correct to take a closer look at the competitive concerns raised by paper barriers.**

With the NPRM, the Board proposed to revise its regulations at 49 CFR §§ 1121.3, 1150.33, 1150.43, and 1180.4 in order to broaden the disclosure requirements applicable to proposed paper barriers. Ameren Missouri strongly supports the Board’s decision to scrutinize the paper barrier issue in the context of the nation’s transportation needs. The Board plays a critical role in ensuring that competitive conditions are maximized in the U.S. rail system. See, e.g., 49 USC § 10101(1), (4), (5), (6), and (12). While there could be limited circumstances in terms of scope and time that an interchange commitment could facilitate the sale or lease of a line to a new short line, paper barriers inevitably harm competition because they preclude otherwise available rail service and/or limit a shipper’s rail options. The impact of a paper barrier on a rail-served facility can include harmful effects such as elimination of rail service,

---

<sup>2</sup> The Board used the term “interchange commitment” in its NPRM, but Ameren Missouri will continue to use the term “paper barrier” because it encompasses the broad array of possible restrictions that can be included in a rail line sale or lease and more accurately describe the situation at Ameren’s Labadie Plant which is of vital concern to Ameren.

increased costs, and reduction in rail service quality. These impacts affect not only the facility itself, but local communities in which the facility operates.

The Board has an affirmative duty to evaluate proposed rail line sales or leases that might impose a new paper barrier. See, e.g., 49 USC § 10901-10902. Ameren Missouri believes the Board should critically evaluate each proposed paper barrier due to the competitive concerns that may be implicated. The Board's duties are not limited to proposed paper barriers, however. When a complaint is filed, the Board also must ensure that pre-existing paper barriers do not transgress the National Transportation Policy ("NTP"), cause a violation of the Interstate Commerce Act, or harm the public interest. Yet, to date, the Board has avoided ruling against any existing paper barrier.

The Board must make certain that paper barrier proceedings are adjudicated fairly and expeditiously. Shippers have the right to challenge pre-existing paper barriers at the Board. See, e.g., Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League, Ex Parte No. 575, slip op. at 15 (served Oct. 30, 2007) ("shippers may, on a case-by-case basis, attempt to show that a particular interchange commitment is causing, or would cause, a violation of the Interstate Commerce Act"). The Board has the authority to void a contractual paper barrier. See, e.g., Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company, Inc., STB Docket No. 42104, slip op. at 7 (served June 26, 2009) ("UP and MNA cannot contract away the statutory rights of a third party or neglect their own obligations under the statute."); Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH and Darlington, PA, in Mahoning and Columbiana Counties, OH and Beaver County, PA, STB Docket No. AB-556 (Sub-No. 2X), slip op. at 3-4 (served Jan. 7, 2000) ("contractual restrictions that unreasonably

interfere with common carrier operations are deemed void as contrary to public policy”). While the NPRM focuses mainly on proposed paper barriers, Ameren Missouri urges the Board to not lose sight of the many pre-existing paper barriers in the rail industry, and the need for an effective means of shippers to challenge such pre-existing paper barriers.

**III. Ameren Missouri generally supports an increase in disclosure regarding paper barriers.**

Ameren Missouri favors the general concept announced in the NPRM that there should be more disclosure and evaluation of proposed paper barriers before they go into effect. See NPRM at 5. The Board proposes that the following information<sup>3</sup> be included in a Notice of Exemption or Petition for Exemption that involves a proposed paper barrier:

- (1) a list of shippers that currently use or have used the line in question within the last two years;
- (2) the number of carloads those shippers specified in paragraph (1) originated or terminated (submitted under seal);
- (3) a certification that the railroad has provided notice of the proposed transaction and interchange commitment to the shippers identified in paragraph (1);
- (4) a list of third party railroads that could physically interchange with the line sought to be acquired or leased;
- (5) the percentage of the purchasing/leasing railroad’s revenue projected to be derived from operations on the line with the interchange commitment (submitted under seal);
- (6) an estimate of the difference between the sale or lease price with and without the interchange commitment (submitted under seal);
- (7) an estimate of the discounted annual value of the interchange commitment to the Class I (or other incumbent carrier) leasing or selling the line (submitted under seal); and

---

<sup>3</sup> Current regulations already require a minimum of information regarding proposed paper barriers. Under the current rules, a party filing a Notice of Exemption or Petition for Exemption related to a rail line sale or lease, where such sale or lease would create a new paper barrier, must give public notice of the existence of the proposed new paper barrier in the Notice of Exemption or Petition for Exemption; the filing party must also file the paper barrier agreement under seal with the Board. See, e.g., 49 CFR §§ 1121.3(d), 1150.33(h), 1150.43(h), and 1180.4(g)(4). The current rules also provide a process by which a “shipper or other affected party” may be granted access to the paper barrier agreement. See id.

- (8) a change in the case caption so that the existence of an interchange commitment is apparent from the case title.

NPRM at 5-6. Ameren Missouri generally supports these new disclosure requirements, but believes that additional considerations must inform the Board's use of the valuation figures described in items (6) and (7) above. See Section IV below.

**IV. If used appropriately, the valuation figures can prove helpful to evaluation of a paper barrier.**

The new disclosure requirements described in the NPRM are intended to enable the Board, shippers, and other interested parties to evaluate and challenge a paper barrier, both before it goes into effect and as part of a petition to revoke later. See, e.g., NPRM at 6 (“This additional information will aid the Board in its review of petitions for and notices of exemption....Furthermore, parties objecting to a petition for exemption or those filing a petition to revoke an exemption will have access to this relevant information...”). In evaluating the lawfulness of a paper barrier, Ameren Missouri believes the valuation disclosures in items (6) and (7) on page 6 of the NPRM could prove crucial. These two items would require the filing party to provide an estimate of (1) the difference between the sale or lease price with and without the interchange commitment, and (2) the discounted annual value of the interchange commitment to the Class I (or other incumbent carrier) leasing or selling the line.

Given that many railroads have often defended paper barriers by arguing that the sale or lease price would have been much higher without the paper barrier, the valuation figures are of potential relevance in a paper barrier case. In fact, valuation evidence is relevant to the evaluation of both proposed paper barriers and pre-existing paper barriers. As the Board knows, Ameren Missouri has argued in its pending paper barrier case that the selling railroad did not discount the sale price of the shortline railroad that serves the Labadie electric generating station.

See, e.g., Ameren Missouri and MCRR Opening Evidence at p. 55 and 57-58, Ameren Missouri and MCRR v. UP (filed April 18, 2011).

However, there is an inherent problem with the NPRM as proposed: there is no verification process in place for the valuation figures asserted by the filing party. Without verification and/or substantiation of the asserted figures, they are of dubious value in any evaluation of a proposed or existing paper barrier. For example, a filing party that wanted to insulate its proposed paper barrier from challenge could simply assert that the price of the sale or lease without the paper barrier would be dramatically higher than with the paper barrier. See item (6) at NPRM p. 6. Similarly, the filing party could assert a very high value of the paper barrier to the incumbent (or Class I) railroad leasing or selling the line. See item (7) at NPRM p. 6. This “made for STB filing” material would not be as valuable as the true internal documents that a railroad used to explain the sale to its management or shareholders.

Due to the lack of substantiation in the NPRM, the Board should state that the filing party has the burden of proof on disclosure data that it submits, and that the filing party should be required to provide verifiable data that supports the asserted figures. Even when verification data accompanies the figures asserted by the filing party, the Board should state also that the figures asserted by the filing party will be understood as merely assertions until and unless proven by the filing party and affirmed by the Board in a contested proceeding.

Valuation can be key to determining whether there is a legitimate purpose for a paper barrier, but the usefulness of valuation evidence depends upon proper verification. Once the figures have been adequately proven and affirmed by the Board in a contested proceeding, the Board can and should use a presumption that the paper barrier is impermissible if the difference

in value (between the value of line with and without the paper barrier) is less than the value obtained by the selling or leasing railroad from the existence of the paper barrier.

Even if the presumption of impermissibility is overturned by the valuation data, the Board still should evaluate all paper barriers for their effect on the NTP and the public interest. See, e.g., Saratoga and North Creek Railway, LLC – Operation Exemption – Tahawus Line, STB Docket No. 35559, slip op. at 6 (served May 14, 2012) (Board states that it “may reject a notice sua sponte, and could reject a notice of exemption without any opposition from shippers, government agencies, or environmental groups, so long as doing so would be in the public interest”). Ameren Missouri urges the Board to use this authority to review paper barriers to ensure that the public interest is not harmed.

**V. The Board can and should adopt additional rules regarding paper barriers.**

While Ameren Missouri applauds the Board’s efforts in the NPRM in addressing the competitive concerns raised by paper barriers, the Board can and should take additional steps to limit the harmful effects of paper barriers on the U.S. economy. In particular, the Board should require that all paper barriers have a reasonable sunset provision, meaning that a paper barrier is necessarily improper if it has either unlimited duration or an unreasonably long effective period. Second, the Board should put the burden of proof on the proponent of a paper barrier, whether the proceeding is a challenge to an existing paper barrier or the proposal of a new paper barrier. Hence, if an existing paper barrier is challenged, the burden should be on the defendant(s) to affirmatively show that the paper barrier is in the public interest and meets the standards of Review of Rail Access (see slip op. at 14-15). Finally, the Board must ensure that challenges to paper barriers are adjudicated in a timely fashion so that rail-served businesses are not kept in a state of uncertainty regarding their transportation options. See, e.g., 49 USC §§ 10101(2) and

(15) (requiring the Board to act “expeditious[ly]”). See also Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company, Inc., STB Docket No. 42104, slip op. at 7 (served March 15, 2011) (paper barrier case lasted over 3 years from complaint to final decision).

**VI. Conclusion.**

Ameren Missouri thanks the Board for the opportunity to provide these Opening Comments regarding the critical issue of paper barriers in the American rail industry. Ameren Missouri generally supports the proposals in the NPRM, with the cautions explained above, and respectfully requests that the Board take the additional steps described herein.

James A. Sobule  
Deputy General Counsel  
Ameren Services Company  
1901 Chouteau Avenue  
St. Louis, MO 63103  
(314) 554-2276

Respectfully submitted,



---

Sandra L. Brown  
David E. Benz  
Thompson Hine LLP  
1919 M Street, N.W., Suite 700  
Washington, D.C. 20036  
(202) 263-4101  
sandy.brown@thompsonhine.com

*Counsel for Union Electric Company d/b/a  
Ameren Missouri*

December 18, 2012